Supreme Court, U.S.
FILED

No. 02-1473 APR 3 2003

In The

Supreme Court of the United States

VINCENT MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court's Denial of Petitioner's Motion to Sever Denied Petitioner of His Right to Due Process of Law and His Right to Confront Witnesses Against Him?

2. Whether the District Court's Order Denying Petitioner's Motion to Dismiss for the Loss/Destruction of Critical Evidence Violated Petitioner's Right to Due Process of Law and *Brady v. Maryland*?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

United States of America;

Mariano Pimentel-Tafolla, aka Mariano Pimentel;

Randy James;

Donald Frank Printz, aka Griz;

Carlos Salazar Lopez, aka Carlos Salazar;

William Lanter, aka Wild Bill; and

Joshua Springfield.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties to the Proceedings Below	ii
Table of Contents	iii
Table of Authorities	iv
Citations of Reports of Opinions and Orders Entered in Case	1
A. Ninth Circuit	1
B. U.S. District Court for the District of Montana, Billings Division	1
Basis of Jurisdiction	1
Constitutional Provisions and Rules Involved in the Case	1
Statement of the Case	3
A. Basis for Federal Jurisdiction in the Court of First Instance	3
B. Statement of the Case	3
Argument	8
A. The District Court's Exclusion of Exculpatory Evidence and Refusal to Sever Martinez Denied Him the Right to Present a Defense and To Fully Cross-Examine Witnesses Against Him	8
B. The Destruction of Brady Material Denied Martinez the Right to Present a Defense and His Right to Due Process of Law	11
Conclusion	16
Appendix	App. 1

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Youngblood, 488 U.S. 51 (1988).....13, 15

Brady v. Maryland, 373 U.S. 83 (1963).....7, 12

Bruton v. United States, 391 U.S. 123 (1968).....7, 9

California v. Trombetta, 467 U.S. 479 (1984).....13

Chambers v. Mississippi, 410 U.S. 284 (1973) 10

Giglio v. United States, 405 U.S. 150 (1972) 12

Kastigar v. United States, 406 U.S. 441 (1972)..... 7

United States v. Blum, 62 F.3d 63 (2nd Cir. 1995).....10

United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976).....14

United States v. Hill, 976 F.2d 132 (9th Cir. 1992) 12

United States v. Marsh, 144 F.3d 1229 (9th Cir. 1988).....10

United States v. Mayfield, 189 F.3d 895 (9th Cir. 1999)..... 9

United States v. Pollack, 417 F.Supp. 1332 (D. Mass. 1976) 14, 15

Zafiro v. United States, 506 U.S. 534 (1993).....7, 8, 9

CONSTITUTION

Amend. V 1

Amend. VI..... 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

18 U.S.C. § 3231 3

18 U.S.C. § 3742 3

21 U.S.C. § 924(c)(1) 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 3

Rules of Criminal Procedure

Rule 14 ..... 2, 7

Rule 16 ..... 3, 5, 7

CITATIONS OF REPORTS OF OPINIONS AND ORDERS ENTERED IN CASE

A. Ninth Circuit.

1. The Opinion of the United States Court of Appeals is an unpublished opinion with a docket number of No. 99-30330, located at 2003 WL 42274 (9th Cir. (Mont.)).

B. U.S. District Court for the District of Montana, Billings Division.

1. The District Court Orders were also unpublished, and are set forth in. No. CR-97-00037-JDS.

BASIS OF JURISDICTION

1. The date of the Ninth Circuit Memorandum sought to be reviewed is January 6, 2003.

2. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THE CASE

1. Amendment V to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the withesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Rule 14 of the Federal Rules of Criminal Procedure.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made

by the defendants which the government intends to introduce in evidence at trial.

4. Rule 16(a)(1)(A) & (C) of the Federal Rules of Criminal Procedure.

Due to its length, the pertinent text is set forth in the appendix.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the Court of First Instance.

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction over appeals from final judgments of the district court under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Statement of the Case.

The United States charged the Petitioner, Vincent Martinez, with conspiracy, three counts of possession with intent to distribute methamphetamine, and three counts of use of a firearm in relation to a drug crime. Martinez pled not guilty.

In Count I of the Indictment, the government alleged, and the jury found, that Martinez and six other defendants participated in a single overarching drug conspiracy that began before May, 1995, and ended on April 17, 1997, when government agents executed a search warrant on the home of Sherry Bishop. Although the conspiracy, as alleged, spanned over two years, the evidence with respect

to Martinez concerned only the seven-month period between May, 1995 and January, 1996.

On December 30, 1995, Martinez was arrested on unrelated state court charges. He remained incarcerated for the majority of the remaining fourteen months of the alleged conspiracy. The government acknowledged that there was no evidence that Mr. Martinez had any further contact, let alone involvement, with any of the other alleged co-conspirators after late January, 1996.

In April, 1996, while Martinez was in state custody, he contacted the joint federal-state drug task force, headquartered in the Billings, Montana office of the federal Drug Enforcement Agency. App. 9. On April 26, 1996, Task Force Officers Lueck and Cummins went to the Detention Center and, with the permission of Martinez's state court lawyer, debriefed Martinez. Martinez made a statement implicating various people, including co-conspirators Sherry Bishop, William Lanter, Carlos Salazar and unindicted co-conspirators Eddie Donnes, Doug Brandon and Michael Holliday, as being involved in methamphetamine. App. 47-49.

Martinez testified by affidavit in the district court that Agents Lueck and Cummins promised that the information he provided the agents would not be used against him by the government. App. 42-46. The government agents disputed this claim. However, the AUSA asked DEA Agent Williams to investigate. Agent Lueck advised Agent Williams that he "[c]ould not recall what motivated Martinez to discuss the dope other than Martinez wanted to make a clean break." App. 10.

During the debriefing, agents Lueck and Cummins took notes of Martinez' statement and returned to their office. Several months later, Agent Lueck prepared a DEA

6, "Report of Investigation," concerning this debriefing. App. 47-49. Lueck testified that the DEA provided him the DEA 6 form and instructed him on how to complete it. After he completed the report, he submitted it to a DEA supervisor for review and approval. It then became part of the DEA drug trafficking database and was cross-referenced to several existing files. The agents' contemporaneous notes of the Martinez debriefing (and other subsequent Rule 16(a)(1)(A) statements of Mr. Martinez), however, disappeared and were never produced in the case below. App. 15.

Agent Lueck testified that he did not know what happened to the notes and letters from Martinez, although he was sure he did not destroy or throw them away. He then testified: "You know, to my knowledge, I turned everything over to Special Agent Williams. It was his case, and I gave him the information that was given to me." Although Agent Williams acknowledged seeing at least one letter from Martinez after the 1997 raid on Sherry Bishop's home, the government argued it was not responsible for the lost statements because Agents Lueck and Cummins "were not cross-deputized."

The information Martinez provided to the DEA played a pivotal role in the ultimate demise of the alleged conspiracy. On April 16, 1997, nearly one year after the Martinez debriefing, Agent Cwalinski, working under the direction of DEA Agent Williams, prepared an Application for a warrant to search the home of Sherry Bishop for methamphetamine and related items. App. 50-51. His statement of probable cause relied primarily upon three "sources of information." One of the sources, and the only source identified by name, was Martinez. App. 51. Cwalinski testified that he found Martinez' statement to be reliable, pertinent and that it "corroborated some of the

information in the majority of the warrant." For those reasons, he used Martinez' statement to obtain a warrant, advising the judge:

> On April 29, 1996, Billings . . . Detective Rick Lueck, who is assigned to the City/County Special Investigations Unit, interviewed Vincent Martinez. Martinez provided the names of several subjects in Billings, MT that were involved in methamphetamine sales and distribution. Sherry Bishop was a person identified by Martinez who sells methamphetamine.

App. 51.

Based upon Martinez's statement and corroborating information, the state court issued the search warrant and the police, working under the direction of the DEA, found drugs, guns and other items. Williams admitted that all of the evidence later used to prosecute the defendants, including Martinez, was the direct or indirect result of the search of Bishop's home and that all of the defendants in the courtroom, including Martinez, were present as a direct or indirect result of the search of the Bishop home. Williams thus admitted that the search warrant, issued in part upon information provided by Martinez, was very important to his investigation.

Following the April 17 search, the agents worked backwards in their investigation that led to the indictments of ten people, including, eventually, Martinez. Prior to trial, Martinez filed several motions, including a motion to dismiss five of the seven counts against him, on the grounds that he withdrew, as a matter of law from the conspiracy when he provided law enforcement with the information about meth distributors, that was later used by law enforcement to obtain a search warrant that in

turn led to the discovery of drugs and the indictment in this case. App. 53-78.

He further moved to dismiss all counts on the basis that Agents Cummins and Lueck granted Martinez informal immunity when they debriefed him while in state custody. *Kastigar v. United States*, 406 U.S. 441 (1972). When the notes of the debriefing and other statements made by him to government agents were not produced as required by Federal Rule of Criminal Procedure 16(a)(1)(A), although the government admitted their existence, Martinez moved to dismiss for loss of critical evidence. *Brady v. Maryland*, 373 U.S. 83 (1963).

Finally, Martinez moved to sever his trial from the others, pursuant to Rule 14, because he intended to use the DEA 6, which formed the basis for the search warrant, as evidence of withdrawal from the alleged conspiracy. App. 53-78. Because the DEA 6 incriminated co-defendants at trial, and Martinez had a right against self-incrimination, Martinez's use of the DEA 6 for his own defense would violate *Bruton v. United States*, 391 U.S. 123 (1968) and absent a severance, Martinez would be denied his right to present a defense and to fully cross-examine witnesses against him. *Zafiro v. United States*, 506 U.S. 534 (1993). *Id.*

The district court denied these motions and then, to prevent a severance, excluded all evidence of (1) Martinez' statement about meth dealers, including the fact that he identified several co-defendants as meth dealers; and (2) the government's use of the Martinez statement to crack the conspiracy. The jury convicted Martinez of conspiracy and two 924(c) counts, and Martinez was sentenced to 593 months in federal prison. App. 28. On appeal, the Ninth Circuit affirmed.

On rehearing, the Ninth Circuit reversed Martinez' conviction under Count VI of the Indictment, a violation of 21 U.S.C. § 924(c)(1), which concerned possession of a firearm (under a *Pinkerton* theory) that came into the alleged conspiracy over one (1) year after Mr. Martinez was in state custody and over one (1) year after he provided law enforcement the statement about meth dealers that was later used by law enforcement to obtain the search warrant of Sherry Bishop's home that in turn also led to his own Indictment.

The Ninth Circuit found that the exclusion of Martinez's statements to the DEA and the government's use of his statement was evidence of withdrawal from the alleged conspiracy and more likely than not affected the verdict on Count VI and thus reversed that count of conviction. App. 14. In light of the reversal of Count VI, the Ninth Circuit concluded that Martinez's severance argument was "moot." App. 15. It further concluded that Martinez failed to show that the loss of the evidence of immunity was due to the government's bad faith. *Id.* With respect to the Confrontation Clause issue, the Ninth Circuit concluded that the jury had sufficient information to gauge witness credibility. App. 14.

ARGUMENT

A. The District Court's Exclusion of Exculpatory Evidence and Refusal to Sever Martinez Denied Him the Right to Present a Defense and To Fully Cross-Examine Witnesses Against Him.

In *Zafiro v. United States*, 506 U.S. 534 (1993), this Court made it clear that severance should be granted "[i]f there is a serious risk that a joint trial would compromise

a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539. The Court identified two situations involving such a serious risk of prejudice.

The first is when the evidence the jury should not consider against the defendant, and that would not be admissible if a defendant were tried alone, is admitted against a co-defendant. This includes situations such as the admission of the co-defendant's prior acts *or of a co-defendant's statement inculpating the defendant*. The second example is when a defendant might suffer prejudice if exculpatory evidence that would be available to a defendant tried alone is unavailable in a joint trial. 506 U.S. at 539.

In this case, Martinez' co-defendants, Lanter and Salazar, enjoyed a constitutional right of confrontation. *Bruton v. United States,* 391 U.S. 123 (1968) holds that a defendant's Sixth Amendment right to confrontation is violated when the confession of a non-testifying co-defendant implicates the defendant as a participant in a crime and that statement is admitted in a joint trial. 391 U.S. 135.

Martinez, on the other hand, enjoyed the fundamental right to defend himself against the charges against him, including presenting evidence of withdrawal, immunity and confronting other witnesses with the evidence. "Confrontation Clause violations can require a court to sever trials." *United States v. Mayfield*, 189 F.3d 895, 901 (9th Cir. 1999).

The district court, as the Ninth Circuit observed, "faced two equally undesirable choices – admit Martinez's statements to law enforcement and risk a possible mistrial on *Bruton* grounds, or order Martinez' case severed on the

eve of trial. But however unsavory the choice, it had to be made. Because the exclusion ruling was clearly erroneous, and because this error more likely than not affected the verdict against Martinez on Count VI, we reverse as to that count." App. 12. Thus, the Ninth Circuit admitted, implicitly, that the district court's order excluding evidence of Martinez's statement and refusing to sever "compromised a specific trial right," the right to present a defense and to cross-examine witnesses. App. 13-14. The Ninth Circuit further held that the district court erred by denying the motion to sever, but because it reversed on Court VI, found the severance issue "moot." App. 15. This does not comport with Martinez's right to present a defense and fully cross-examine witnesses against him.

"Whether rooted in the Due Process Clause of the Fifth Amendment or in the Compulsory Process Clause of the Sixth Amendment, the constitution guarantees criminal defendants the right to present a defense." *United States v. Blum*, 62 F.3d 63, 66 (2nd Cir. 1995). *See also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). "The right to cross-examine one's accusers is fundamental in our system of justice. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *United States v. Marsh*, 144 F.3d 1229, 1240 (9th Cir. 1988). The exclusion of exculpatory evidence and refusal to sever Martinez denied him his right to present a defense and to fully cross-examine witnesses against him, thus tainting all counts of conviction.

Sherry Bishop was the principal adverse witness against Martinez. The evidence established that Bishop provided the DEA with multiple statements following her

arrest in 1997. Before she was indicted, she advised agents that Martinez did not distribute meth, although she stated he "supervised" Salazar. After her indictment, and the receipt of discovery, her statements about Martinez changed significantly. She then made statements about distributions of meth and the discharge of firearms to collect drug debts – serious allegations – and the basis for which the jury later convicted Martinez. Although Martinez was able to impeach Bishop about the absence of such statements in earlier debriefings, he was unable to demonstrate to the jury the motive she had to fabricate her testimony – the fact that Martinez told law enforcement that she was a meth dealer, and that Martinez's statement to law enforcement was used in the search warrant application that led to the search of her home, her indictment, the loss of her children and her incarceration. This, in turn, has a prejudicial effect on the two (2) counts of conviction because it deprived the jury of key evidence necessary to fairly evaluate Mr. Martinez's guilt or innocence with respect to distribution of meth and the use of firearms.

Martinez respectfully submits, as the Ninth Circuit found, that the exclusion of evidence and refusal to sever denied Martinez certain trial rights: the right to present a defense and to fully cross-examine witnesses against him. The reversal on Count VI did not remove the admitted taint on the remaining counts of conviction.

B. The Destruction of Brady Material Denied Martinez the Right to Present a Defense and His Right to Due Process of Law.

The government destroyed or lost relevant documents in its possession critical to the issue of the immunity that

Martinez testified he was offered in support of the statements that he provided to the government that were later used by the government to prosecute and advance this conspiracy. When the defendant is precluded from admitting such obvious exculpatory information because the government has lost or destroyed that information, the defendant is prejudiced and denied his right to present a defense.

A defendant's right of access to evidence obtained by the government is protected by a variety of statutory and constitutional safeguards. In *Brady v. Maryland*, 373 U.S. 83, the Court held that the government must volunteer "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In *Giglio v. United States*, 405 U.S. 150 (1972), the Court expanded the rule to include evidence that may be used to impeach an important government witness. As a result, the prosecution must disclose materials "that go to the heart of the defendant's guilt or innocence and materials that might affect the [trier's] judgment of the credibility of a crucial prosecution witness." *United States v. Hill*, 976 F.2d 132, 134-35 (9th Cir. 1992) (*citing Giglio*, 405 U.S. at 154).

In short, there is a long-established duty on the part of the government to preserve all evidence subject to discovery that is gathered during the course of an investigation; in particular, witness statements. The DEA Special Agents' Manual recognizes this duty and that sanctions will be imposed for the loss of agent notes:

6211.6 PRESERVATION OF INVESTIGATIVE NOTES.

A. Rough notes taken by an Agent while interviewing a potential government witness, an informant, a suspect, or a subject of an investigation are subject to discovery. Failure to produce these notes, even due to good faith loss or destruction, could result in dismissal of the case. Agents will therefore preserve any such notes even though their contents have been subsequently reported on a DEA Form 6.

B. The term "notes" includes handwritten notes, original tapes, or other work papers made during the interview of potential government witnesses.

Excerpt of DEA Special Agent's Manual, Exh. M, Transcript of Hearing, dated 5/27/99 at 33-36.

The government in this case "lost," or was unable to find, and had no explanation for its loss of, Mr. Martinez's statements that were used to form the basis of a search warrant that led, in turn, to his own indictment. The result of the loss of this evidence was devastating to Mr. Martinez' testimony that he was advised that the evidence he provided would not be used against him, as it was in this case. The government agents in this case merely had to say the notes were given to another agent, who, in turn, said he didn't know what happened, to avoid any possible finding of "bad faith." In light of this testimony, the Ninth Circuit found no evidence of bad faith destruction, a finding that will rarely, if ever, result for a defendant like Martinez. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479, 487 (1984).

As a matter of due process of law, the loss or destruction of exculpatory evidence, where admitted by the government, as in this case, and even if the result of negligence, require the imposition of sanctions against the government. This protection is necessary because of the inherent danger that an agent may tailor a final report from preliminary memoranda to fit the needs of the prosecution, *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976), and/or because of the jury's inherent bias in favor of law enforcement testimony and against that of a person charged with a crime.

In *United States v. Pollack*, 417 F.Supp. 1332 (D. Mass. 1976), the district court dismissed an indictment because of the loss of a deputy sheriff's notes which formed the basis of a report. The facts of that case are similar to those presented here. There, the defendant claimed he agreed to work as an undercover agent for the government and that his work would result in "consideration for favorable disposition of any charges which might have been forthcoming from his arrest." Notes of the meeting were prepared and later used, in part, for a subsequent report. The notes were then destroyed. The government agent disagreed any favors had been granted to defendant. The district court then stated:

> In view of these conflicting versions of crucial events given by [the defendant] and the government agents . . . the importance of the contemporaneous notes . . . of that conversation looms large. Defendant and this court, therefore, have been deprived of relevant, and perhaps highly exculpatory, evidence important to the resolution of the critical factual and legal questions on which this prosecution rests.

* * *

> In short, the missing notes represented a potentially important piece of substantive evidence as well as a means for impeaching the testimony of one of the agents of the DEA Task Force.

Id. at 1342-43.

In this case, the only evidence lost concerned Martinez and his cooperation (and offer to cooperate) with the government. The notes of the two government agents went to a critical issue – the facts surrounding the debriefing of Martinez and the offer of immunity from prosecution. Martinez's testimony before the district court makes clear that he understood the information he provided to the agents would not be used against him. App. 42-46. Instead, it was used as the basis for the search warrant which in turn led to his own indictment.

The agents' notes, taken contemporaneously with the debriefing, were even more critical because the DEA 6 of the Martinez debriefing was not prepared until six months after the debriefing. The loss of notes thus prevented Martinez from examining the agents about (1) discrepancies between the agents' testimony and the DEA 6; (2) discrepancies between the agents' notes; and (3) most importantly, establishing the existence of an agreement that the government would not use the information against Martinez, as it was in this case. This is critical evidence – all relevant and highly exculpatory, that Martinez was deprived of as a result of the government's misconduct. In such a situation, the requirement of a showing of bad faith on the part of the government under *Youngblood,* does not comport with fundamental notions of fairness and due process of law. A person charged with a crime, and facing significant incarceration, should not be

held to such an unattainable standard. Instead, it is the government that should be held accountable for the loss of evidence, even if the loss is the result of negligence. Such a result encourages accurate government investigations and ensures that the criminal defendant is not deprived of his right to due process of law.

In sum, the requirement that a criminal defendant show bad faith on the part of the government agency, when it loses exculpatory evidence, or evidence of a defendant's statements to law enforcement should be revisited by this Court. Martinez understood he would be granted immunity for the statements he gave to the agents – statements that led to his indictment. Where, as here, the government admittedly loses critical evidence, resulting in a swearing contest between a criminal defendant and law enforcement, it is the government that properly bears the consequences of its own misconduct.

CONCLUSION

For the foregoing reasons, Mr. Martinez requests that this Court grant the Petition.

Respectfully submitted,

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April, 2003

2003 WL 42274

United States Court of Appeals, Ninth Circuit.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Mariano PIMENTEL-TAFOLLA, aka Mariano Pimentel, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Randy JAMES, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Donald Frank PRINTZ, aka Griz, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Vincent MARTINEZ, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Carlos Salazar LOPEZ, aka Carlos Salazar, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
William LANTER, aka Wild Bill, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Joshua SPRINGFIELD, Defendant-Appellant.

Nos. **99-30330**, 99-30335, 99-30336, 99-30337, 99-30357, 99-30358, 99-30369.
D.C. No. CR-97-00037-JDS.

Argued and Submitted Jan. 10, 2001.
Decided Jan. 6, 2003.

Appeal from the United States District Court for the District of Montana, Jack D. Shanstrom, District Judge, Presiding.

Before MCKEOWN, W. FLETCHER, and RAWLINSON, Circuit Judges.

ORDER

This Court's memorandum disposition, filed October 17, 2002, is hereby withdrawn and replaced with the attached disposition.

With the filing of this new disposition, Appellant Springfield's petition for rehearing, filed October 31, 2002, is DENIED.

MEMORANDUM*

The seven defendants in these consolidated cases (Mariano Pimentel-Tafolla, Randy James, Donald Frank Printz, Vincent Martinez, Carlos Salazar-Lopez, William Lanter, and Joshua Springfield) were involved, to varying degrees, in a methamphetamine trafficking conspiracy in Billings, Montana. All were convicted of conspiracy to possess methamphetamine with intent to distribute, under 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 2. Each defendant was also convicted of some combination of various counts of possessing with intent to distribute methamphetamine, under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and using a firearm in a drug trafficking crime, under 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2. The facts of the case and the specific convictions are well known to all parties, so we will not repeat them here except as necessary to explain our holding.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

We address Appellants' contentions on appeal in turn.

1. Pimentel-Tafolla's Motion for a Mistrial

Pimentel-Tafolla argues on appeal that the district court should have granted his motion for a mistrial based on the prosecutor's statements during his closing argument. The prosecutor stated in his closing argument that the defendants failed to testify, but he explicitly stated that they had a constitutional right to do so and he did not dwell on the point. While a prosecutor may violate the Fifth Amendment if he comments on a defendant's failure to testify at trial, *Griffin v. United States,* 380 U.S. 609, 611-12, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), such a comment is impermissible only "if it is manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *United States v. Tarazon,* 989 F.2d 1045, 1051-52 (9th Cir.1993) (citations omitted). Rather than calling attention to the defendants' failure to testify, the prosecutor called attention to their failure to call other witnesses.

Pimentel-Tafolla also claims that the prosecutor should not have commented on his (and the other defendants') failure to call witnesses. We have held that a prosecutor's comment on a defendant's failure to call witnesses is proper as long as it "is not phrased as to call attention to defendant's own failure to testify." *United States v. Passaro,* 624 F.2d 938, 944 (9th Cir.1980). The prosecutor's comments here were focused on the "unfairness" of defense counsel's comments about other witnesses, given their failure to call witnesses of their own to refute

the testimony of the government's witnesses, and did not focus on the defendants' failure to testify.

The district court therefore did not abuse its discretion in denying Pimentel-Tafolla's motion for a mistrial.

2. Reduction in James's Base Offense Level for Acceptance of Responsibility

James contends on appeal that his base offense level should have been decreased because of his acceptance of responsibility. However, James did not plead guilty; instead, he went to trial on all seven counts. He claims on appeal that he chose that course because his attorney recommended it on the ground that a guilty plea would have required him to plead to the entire weight of the drugs involved in the conspiracy, and that his pre-trial conversations with law enforcement officials should count as acceptance of responsibility.

Section 3E1.1(a) of the Federal Sentencing Guidelines ("U.S.S.G."), pertaining to acceptance of responsibility, provides that "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense," the base offense level is to be decreased by two levels. In a case in which the defendant "presented an elaborate and complex defense, challenging both the legal validity of the government's theory of the case and his factual guilt," we held that the district court had not clearly erred in denying the downward adjustment. *United States v. Hicks,* 217 F.3d 1038, 1050 (9th Cir.2000).

Because James forced the government to prove his guilt beyond a reasonable doubt at trial, and because he did not clearly accept responsibility during his pre-trial

conversations with law enforcement officials, his actions do not fall within the rule for acceptance of responsibility as construed by this court.

3. Rule 29 Motion and Sufficient Evidence for Conviction of Conspiracy and Possession

Printz, Martinez, Salazar-Lopez, Lanter, and Springfield argue on appeal that the district court erred by denying their Federal Rule of Criminal Procedure 29 motions for judgments of acquittal. They contend that multiple conspiracies, not a single conspiracy, were proven at trial. Printz and Lanter further claim that the evidence presented at trial was insufficient to convict them either of conspiracy or of possession of methamphetamine with intent to distribute.

A. Rule 29 Motion for Judgment of Acquittal

Viewing the evidence in this case in the light most favorable to the prosecution, as we must, it appears that there was ample evidence for a reasonable jury to conclude beyond a reasonable doubt that there was a single conspiracy. Salazar acquired drugs from suppliers in Turlock, California. Although he first sold the drugs in Billings through a distributor named Lira, Lanter soon became involved in the distribution. Lanter purported to have Mafia and law enforcement connections, and Salazar was informed he would have to pay off Lanter if he wanted to do business in Billings. Lanter housed Salazar at one point; sold his house to help Salazar pay off drug debts; accompanied Salazar in kidnapping and beating Lira, who had not paid for some drugs; and finally accompanied Salazar back to California to buy more methamphetamine.

Martinez also accompanied Lanter and Salazar back to Billings. The three sold the drugs acquired on that trip from adjoining hotel rooms in Billings. Later shipments of drugs, which were driven by Pimentel-Tafolla from Turlock to Billings, were distributed by Salazar, Printz, James, Springfield, and others not party to this action.

While some people involved in distributing earlier shipments were not involved in distributing later shipments, a reasonable jury could have found that there was one conspiracy, the point of which was to bring drugs from Turlock to Billings and to distribute them there at a profit. Each member played essentially the same role throughout his association with the conspiracy, although the method of transporting the drugs from California to Montana changed because the conspiracy was successful and therefore needed to bring in larger quantities of drugs for distribution. As we have previously stated, "[e]ach appellant benefit[t]ed from the other appellants' participation in the illegal enterprise. The appellants depended on a functioning distribution network that could sell their [drugs] whenever they had a supply." *United States v. Arbelaez,* 719 F.2d 1453, 1459 (9th Cir.1983).

Therefore, the district court did not err in denying Appellants' Rule 29 motions.

B. Sufficiency of the Evidence

Conspiracy

Printz and Lanter claim that the evidence was insufficient to connect them to the conspiracy. In order to connect a defendant to a conspiracy, "'[t]he government need not show direct contact or explicit agreement between the defendants. It is sufficient to show that each defendant

knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that [his] own benefits were dependent upon the success of the entire venture.'" *Id.* at 1458-59 (citations omitted). Furthermore, "[e]vidence is sufficient to connect a defendant to a conspiracy if it shows that the defendant had knowledge of and participated in the conspiracy." *United States v. Duran,* 189 F.3d 1071, 1078 (9th Cir.1999).

Printz was aware of the significant amount of drugs involved in the conspiracy: he helped transport one of the methamphetamine "eggs" from the storage locker to Bishop's house; he was present at the house when the drugs were being broken up and weighed; and he helped sell the drugs. Given his familiarity with Bishop's house, from which much of the drugs were sold, a jury could reasonably have found that he at least should have known the scope of the conspiracy. A jury likewise reasonably could have found that he also should have known that he was dependent on others in the conspiracy – for example, those who originally purchased the drugs and those who transported the drugs from California to Montana.

Lanter was also clearly a part of the conspiracy. He purchased methamphetamine in California, helped Salazar sell that amount and more in Montana, and assisted Salazar when the latter needed money and a place to stay. These latter actions assured that he would have a way of getting drugs from California to Montana.

Possession

Printz and Lanter also claim on appeal that the evidence was insufficient to convict them of conspiracy to distribute and possession of methamphetamine with

intent to distribute. Viewing the evidence in the light most favorable to the government, the evidence was sufficient for a reasonable jury to find the elements of the crime beyond a reasonable doubt.

While there is evidence that Printz helped pick up and sell some of the drugs, such direct evidence of possession by Printz and Lanter is not required for their conviction for possession with intent to distribute. "[A] co-conspirator is vicariously liable for reasonably foreseeable substantive crimes committed by a co-conspirator in furtherance of the conspiracy." *United States v. Fonseca-Caro,* 114 F.3d 906, 907 (9th Cir.1997) (citing *Pinkerton v. United States,* 328 U.S. 640, 647-48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)). "To establish *Pinkerton* liability, the prosecution must demonstrate '(1) the substantive offense was committed in furtherance of the conspiracy; (2) the offense fell within the scope of the unlawful project; and (3) the offense could reasonably have been foreseen as a necessary or natural consequence of the unlawful agreement.'" *Fonseca-Caro,* 114 F.3d at 908 (citation omitted). The prosecution established all three elements; there was therefore sufficient evidence to convict Printz and Lanter of possession with intent to distribute.

4. Exclusion of Evidence and Severance Challenged by Martinez

A. Withdrawal

Martinez argues that his Count VI conviction, which was based on a *Pinkerton* theory of liability, *see Pinkerton v. United States,* 328 U.S. 640, 647-48, 66 S.Ct. 1180, 90 L.Ed. 1489 (U.S.1946), must be reversed because the district court abused its discretion when it excluded

evidence of Martinez's alleged withdrawal from the conspiracy in April of 1996. We agree.

Martinez was convicted of Count I (conspiracy), 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 2, and Counts II and VI (use or possession of firearms in the course of a drug trafficking scheme), 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2. The Count II conviction "dealt with possession of a 9 millimeter handgun or a short-barreled shotgun with a pistol grip between May and July of 1995." Tr. at p.1904 (Government's closing argument). The Count VI conviction, by contrast, dealt with a .44 magnum revolver and a .25 caliber handgun "more directly related to the end of the conspiracy and the conduct in April of 1997." *Id.* The Count VI conviction, because it was a "second or subsequent" conviction under § 924(c), resulted in the imposition of a twenty-year sentence. *See* 18 U.S.C. § 924(c)(1)(C)(i) (1994).

The Excluded Evidence of Withdrawal

The excluded evidence at issue includes statements Martinez made on his own initiative to law enforcement in April of 1996 implicating two of his co-defendants and other unindicted co-conspirators in a methamphetamine trafficking scheme in Billings, Montana – statements which were later used to support a search warrant for unindicted co-conspirator Sherry Bishop's home, the execution of which produced enough evidence to bring this case to trial. Martinez has shown that Agent Lueck (the law enforcement agent who took Martinez's statement)[1]

[1] Martinez was in state prison at the time.

was available to testify that Martinez expected no favors in return for his information and that Martinez told him, among other things, that he wanted "to make a clean break."

District Court Proceedings

Before trial, Martinez moved to dismiss several of the charges against him on the ground that, as a matter of law, he had withdrawn from the conspiracy. In opposing the motion, the government stated:

> The defendant's motion and brief on this issue [withdrawal] seem to be a preview of defense counsel's closing argument at trial in the event he is successful in persuading this court to give an instruction on withdrawal. . . .
>
> The factual assertions that defendant makes in his motion and brief are and will be in dispute at trial and that dispute will be most appropriately resolved by a jury after his trial. The defendant's motion for dismissal should therefore be denied.

The motion was denied, and the jury did receive an instruction on withdrawal: "You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal."

Martinez next requested a severance, on the ground that the admission of his statements to law enforcement that tended to indicate withdrawal would present a *Bruton* problem for his co-defendants. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (admitting non-testifying defendant's confession that incriminates co-defendant violates co-defendant's confrontation rights and is prejudicial error). The court recognized

the existence of the problem, suggesting partial severance. Martinez indicated that he felt additional counts were affected and should also be severed. The government then stated that it would be reluctant to agree to severance, and asked for an overnight recess to research the issue.

The next day the government argued (1) that the evidence should be excluded because irrelevant to the issue of withdrawal (based on the fact that Martinez apparently did not implicate himself and did not refer in his statement to a "conspiracy"), and (2) in the event the court found the evidence relevant (and therefore did not exclude it), that redaction of the co-defendants' names rather than severance was the appropriate solution. Martinez had objected to the redaction approach the day before, arguing that to redact the names of his co-defendants would weaken the impact of the evidence.

Just before the judge took a recess to decide the issue, he remarked: "[N]obody has mentioned the other partial solution of dismissing three counts that he's talking about, and that would have happened after the withdrawal, assuming there was a withdrawal. Then the statement wouldn't be relevant at all." The government responded by reiterating its relevance argument, and Martinez informed the court that "there may be two gun counts that may also be subject to the same withdrawal motion." The judge then recessed, and returned with the following ruling:

> This motion is kind of coming in through the back door. Actually, it shouldn't really be Martinez's motion to make, but I'm going to treat it now as a motion in limine, and I am going to rule that the statement is inadmissible. I'm going to exclude the statement on the grounds of irrelevance, confusing, and does not satisfy the

elements of the claim of withdrawal. So you're not going to be able to use the statement.

Discussion

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Williams,* 291 F.3d 1180, 1189 (9th Cir.2002). Under this standard of review, an appellate court should reverse if "it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached," *SEC v. Coldicutt,* 258 F.3d 939, 941 (9th Cir.2001), and the error more likely than not affected the verdict, *see United States v. Edwards,* 235 F.3d 1173, 1178 (9th Cir.2000). Because we find the district court's decision to exclude Martinez's evidence of withdrawal constituted a clear error of judgment, and because this error more likely than not affected the verdict on Count VI, we reverse.

The standard of relevance in the federal courts is quite liberal: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. The question of whether Martinez had withdrawn from the conspiracy in April of 1996 was clearly an issue of consequence to the determination of the action – if he had, he could not be held liable for his co-conspirators' firearms violations in April of 1997. *See United States v. Lothian,* 976 F.2d 1257, 1262 (9th Cir.1992) ("a defendant cannot be held liable for substantive offenses committed before joining or after withdrawing from a conspiracy"). The specific evidence that was excluded, moreover, had a substantial tendency to make the fact of withdrawal more probable than it would be

without it. "A conspirator can withdraw from a conspiracy by: (1) disavowing the unlawful goal of the conspiracy; (2) affirmatively acting to defeat the purpose of the conspiracy; or (3) taking definite, decisive, and positive steps to disassociate himself from the conspiracy." *United States v. Fox,* 189 F.3d 1115, 1118 (9th Cir.1999) (internal quotation marks omitted). Martinez's statements to law enforcement were later used to support a search warrant that led to the dismantling of the conspiracy. His motivation, according to law enforcement, was to "make a clean break." This evidence, at the very least, had a tendency to make it more probable than otherwise would be the case that Martinez "affirmatively [acted] to defeat the purpose of the conspiracy." *Id.* The district judge's decision to exclude this evidence on relevancy grounds, therefore, was clearly erroneous.

So, too, was the decision to exclude the evidence on the alternative ground of "confusion." Given the straightforward nature of the evidence, and its importance to Martinez's defense, to find its "probative value substantially outweighed by the danger of . . . confusion of the issues" constitutes clear error. Fed.R.Evid. 403.[2]

We recognize that the district judge faced two equally undesirable choices – admit Martinez's statements to law enforcement and risk a possible mistrial on *Bruton* grounds, or order Martinez's case severed on the eve of trial. But however unsavory the choice, it had to be made.

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[2] The district judge's third ground – that the evidence "does not satisfy the elements of the claim of withdrawal" – is not a permissible basis for exclusion. *See* Fed.R.Evid. 401.

Because the exclusion ruling was clearly erroneous, and because this error more likely than not affected the verdict against Martinez on Count VI, we reverse the conviction as to that count. This reversal requires resentencing on remand.

B. Confrontation Rights

Martinez also argues that the exclusion of evidence relating to his statements to law enforcement violated his confrontation rights under the Sixth Amendment of the United States Constitution, tainting the convictions on Counts I and II. Although his counsel cross-examined Sherry Bishop (one of the persons Martinez implicated in his April 1996 statement), Martinez claims that his inability to question her about her knowledge of his statements to law enforcement prevented him from adequately challenging her credibility.

In determining whether a district court, in excluding evidence, violated a defendant's Sixth Amendment right to confrontation, this court considers three factors: (1) "whether the excluded evidence is relevant"; (2) "[i]f the evidence is relevant, . . . whether there were other legitimate interests outweighing a party's interest in presenting the evidence"; and (3) "whether the trial court's exclusion of evidence left the jury with sufficient information upon which to assess the credibility of witnesses." *United States v. James,* 139 F.3d 709, 713 (9th Cir.1998) (citation and internal quotation marks omitted). "When the trial court excludes evidence tending to impeach a witness, it has not abused its discretion as long as the jury has in its possession sufficient information to appraise the biases and

motivations of the witness." *United States v. Kennedy,* 714 F.2d 968, 973 (9th Cir.1983).

Because the jury already had sufficient information upon which to assess Bishop's credibility (including Bishop's drug habits, her prior relationship with Martinez, and her inconsistent statements to police), we hold that Martinez did not suffer a Sixth Amendment violation by the exclusion of his statements to law enforcement.

C. Severance

Martinez's claim regarding severance is moot.

5. Exclusion of Evidence of Martinez's Statements to Law Enforcement Officials

Martinez claims that the government's failure to produce the letter he wrote to narcotics agents and the notes those agents took during or after the interview with him violates his right to confrontation. He also claims that the district court erred in denying his motion to dismiss on these grounds. The government's loss or destruction of the notes cannot be a violation of the Confrontation Clause, because it does not involve witnesses testifying against Martinez. To the extent that Martinez's claim has a constitutional basis, it is the Due Process Clause.

This court has set out a two-pronged test under the Due Process Clause for "cases of constitutionally guaranteed access to evidence, wherein the Government loses potentially exculpatory evidence." *United States v. Dring,* 930 F.2d 687, 693 (9th Cir.1991). Under this test, the burden is on the defendant to "make an initial showing that the Government acted in bad faith and that this

conduct resulted in prejudice to the defendant's case." *Id.* Martinez has satisfied neither of these prongs. There is no evidence in the record showing that the notes and letter were lost or destroyed due to the government's bad faith. There is also no evidence in the record tending to show that the notes or letter were facially exculpatory.

6. Martinez's Sentence of Twenty Years for his Second Count of Conviction Under 18 U.S.C. § 924(c)

Because we reverse Martinez's conviction on Count VI, *see supra,* we need not address Martinez's argument that the sentence imposed for that conviction violates his due process rights under *United States v. Castaneda,* 9 F.3d 761 (9th Cir.1993), or that it constitutes cruel and unusual punishment.

7. Salazar-Lopez's Evidentiary Challenges

Salazar-Lopez challenges several evidentiary rulings on appeal.

A. Hearsay Statements

First, Salazar-Lopez asserts that his confrontation rights were violated by the admission of hearsay statements of unindicted co-conspirator Carlos Marquez, as well as by what he claims to be *Bruton* testimony. Under Federal Rule of Evidence ("FRE") 801(d)(2)(E), hearsay statements may be admitted when they are "offered against a party" and are made by "a coconspirator of a party during the course and in furtherance of the conspiracy."

Marquez's statements were recounted by David Gil. Both Marquez and Gil appear to have been co-conspirators, as both were sources from whom Salazar-Lopez purchased methamphetamine in Turlock. It is of no consequence that they were not indicted, *see United States v. Everett,* 692 F.2d 596, 601 (9th Cir.1982), because the statements were clearly made during the course of the conspiracy. One of the statements, regarding Salazar-Lopez wiring money to Marquez through Western Union, was in furtherance of the conspiracy. The other statement, regarding Salazar-Lopez taking half of a certain amount of drugs to Billings so that Gil could take the other half, is less clearly in furtherance of the conspiracy. However, "[e]vidence erroneously admitted in violation of the Confrontation Clause must be shown harmless beyond a reasonable doubt, with courts considering the importance of the evidence, whether the evidence was cumulative, the presence of corroborating evidence, and the overall strength of the prosecution's case." *United States v. Bowman,* 215 F.3d 951, 961 (9th Cir.2000) (citation omitted). Given the amount of evidence against Salazar-Lopez and the corroboration of the first statement, the admission of this statement, even if erroneous, did not constitute reversible error.

Salazar-Lopez also claims that statements made by Martinez and Lanter should be excluded under *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). We have stated that in *Bruton,* "the Supreme Court held that admission at a joint trial of a co-defendant's confession implicating the defendant violated the defendant's sixth amendment right to confrontation. The inculpatory statements which form the basis of [appellant's] *Bruton* claim were not statements made in a confession,

but were statements made by [a co-conspirator], in furtherance of a conspiracy." *United States v. McCown,* 711 F.2d 1441, 1448 (9th Cir.1983). Under our holding in *McCown,* Salazar-Lopez's *Bruton* claim fails.

B. Federal Rule of Evidence 404(b) Evidence

Salazar-Lopez objects to the admission of testimony regarding an instance in which Martinez threatened and hit a man.[3] This evidence is not, however, Federal Rule of Evidence ("FRE") 404(b) evidence, as Salazar-Lopez alleges. That rule makes evidence of "other crimes" admissible for purposes such as "proof of motive, opportunity, intent, preparation, [or] plan." FRE 404(b) does not apply when the "evidence concerning the other act and the evidence concerning the crime charged are 'inextricably intertwined.'" *United States v. Ripinsky,* 109 F.3d 1436, 1442 (9th Cir.1997) (citation omitted), *overruled on other grounds by United States v. Sablan,* 114 F.3d 914 (9th Cir.1997). The evidence regarding Martinez's mode of collecting on drug debts is "inextricably intertwined" with evidence regarding other parts of the conspiracy. Therefore it is admissible for all purposes.

Salazar-Lopez also claims that the district court erred by failing to grant his motion for a mistrial due to the

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[3] Salazar-Lopez claims on appeal that the district court erred by admitting evidence in violation of Federal Rules of Evidence ("FRE") 401, 402, 403, and 404(b). However, he elaborates only on the violation of FRE 404(b) and does not mention the other rules again. The relevance of FRE 401, 402, and 403 to Salazar-Lopez's argument is not immediately apparent, and we will not address the possible applicability of these rules.

failure of the government to give all Appellants notice of its intention to use FRE 404(b) evidence obtained from a search, executed pursuant to a warrant, of Salazar-Lopez's house in Turlock. The evidence on which Salazar-Lopez focuses is pieces of paper recovered at the house. These papers alone are not evidence of bad acts; therefore they do not fall within the scope of FRE 404(b). Consequently, even if notice was not properly given and the evidence was improperly admitted, it was not reversible error under FRE 404(b).

8. Enhancement of Salazar-Lopez's Base Offense Level for his Alleged Role as a Supervisor of the Conspiracy

The district court increased Salazar-Lopez's base offense level by four levels due to his role as an organizer or leader, under U.S.S.G. § 3B1.1. In order to be subjected to this offense level enhancement, a defendant "need only [have] exercise[d] authority over one and not all of the other participants in order to merit the adjustment." *United States v. Camper,* 66 F.3d 229, 231 (9th Cir.1995).

The district court did not err in enhancing Salazar-Lopez's base offense level under U.S.S.G. § 3B1.1, because evidence in the record establishes that Salazar-Lopez wielded a high degree of authority in the conspiracy. For example, he discussed with Lira the viability of setting up a drug operation in Billings; he set the terms of a deal with Lira; and he introduced Lanter to his connection.

9. Denial of Downward Departure for Salazar-Lopez on Grounds of Alien Status, and his Request for a Recommendation to the Bureau of Prisons that he be Incarcerated in Mexico

This court may not review a district court's discretionary denial of a downward departure. *United States v. Wetchie,* 207 F.3d 632, 636 (9th Cir.2000). The district court did not indicate that it lacked discretion to depart; only if it had so indicated would this decision be reviewable. *United States v. Davoudi,* 172 F.3d 1130, 1133 (9th Cir.1999).

Appellant Salazar-Lopez requested that the district court recommend to the Bureau of Prisons that he serve his sentence in Mexico. The district court does not have jurisdiction to decide the location of a defendant's incarceration; authority over that decision is held by the executive branch. *United States v. Dragna,* 746 F.2d 457, 458 (9th Cir.1984). Therefore the district court's denial of the request to recommend was not error.

10. Lanter's Consecutive, Rather than Concurrent, Sentences

The district court has discretion to impose concurrent or consecutive sentences. *United States v. Otis,* 127 F.3d 829, 834 (9th Cir.1997); *see also* 18 U.S.C. § 3584(a); U.S.S.G. § 5G1.3(c).

The current version of U.S.S.G. § 5G1.3(c), which was in effect at the time of Lanter's sentencing, and its application notes leave to the district court's discretion the choice between concurrent and consecutive sentences. Under 18 U.S.C. § 3584, the district court must consider the factors set out in 18 U.S.C. § 3553(a) when deciding

between consecutive and concurrent sentences. Section 3553(a) states that

> [t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed-
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for-
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). Lanter is serving consecutive sentences of 318 months and 660 months, which, given his age, is the practical equivalent of a life sentence. Ordering these sentences to be served consecutively may be "greater than necessary . . . to comply with the purposes" of 18 U.S.C. § 3553(a)(2).

The district court's decision is reversible only if we find an abuse of discretion. However, the district court must have stated its reasons for imposing the sentences consecutively. It is not clear from the record whether the district court considered the factors listed in 18 U.S.C. § 3553(a). *See United States v. Luna-Madellaga,* 133 F.3d 1293, 1294 (9th Cir.1998) (stating that a sentencing court, in determining whether to give concurrent, partially concurrent, or consecutive sentences, "is to consider" the factors set out in 18 U.S.C. § 3553(a) as well as those listed in U.S.S.G. § 5G1.3, application note 3). Because the district court failed to show that it considered these

factors, and because the aggregate sentence may be greater than necessary to comply with the purposes of § 3553(a)(2), we reverse and remand for resentencing.

11. *Apprendi* Errors

The Appellants all filed supplemental briefs arguing that the district court erred at sentencing in attributing to them drug quantities that were not found by the jury beyond a reasonable doubt, in violation of the rule set forth in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). *Apprendi* was decided after the Appellants were sentenced by the district court, and Appellants did not raise these objections to their sentences below. We therefore review for plain error. *See* Fed.R.Crim.P. 52(b). To secure reversal under this standard, Appellants must prove that: (1) there was "error"; (2) the error was "plain"; and (3) that the error affected "substantial rights." *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). If these conditions are met, we may exercise our discretion to "notice a forfeited error" only if the error (4) "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

Because the jury found beyond a reasonable doubt only that Appellants had conspired to possess and possessed with intent to distribute a "measurable amount" of methamphetamine, the statutory maximum is 20 years (240 months). 21 U.S.C. § 841(b)(1)(C). Appellants James,

Pimentel-Tafolla, and Springfield were each sentenced to less than 240 months, and thus there was no *Apprendi* error in their sentencing. However, Appellants Salazar-Lopez, Printz, Lanter and Martinez each received sentences of greater than 240 months, and the district court therefore erred in sentencing these four Appellants. In light of *Apprendi,* that error is now plain. *See Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration").

Nonetheless, under the fourth step in the plain error analysis, we decline to notice the forfeited error, for "[e]ven assuming [these four Appellants'] substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781, 1786, 152 L.Ed.2d 860 (2002). In *Johnson v. United States,* 520 U.S. 461, 470, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), the Supreme Court held, under the fourth step, that a failure to submit an element of the crime to the jury for decision did not require reversal because the evidence of that element introduced at trial was "overwhelming" and "essentially uncontroverted." In *Cotton,* the Supreme Court applied the *Johnson* analysis to an error under *Apprendi* in which neither the grand nor petit jury had determined the actual quantity of drugs. The precise question answered in *Cotton* was whether the grand jury, rather than the petit jury, should have been asked to determine whether the quantity of drugs exceeded 50 grams. But it is clear that *Cotton* applies to a failure to submit the quantity of drugs to the petit jury as well as to

the grand jury, for *Johnson,* the foundation case for *Cotton,* involved a failure to submit an element of the crime to the petit jury.

In this case, the evidence that the conspiracy involved large quantities of drugs "was overwhelming and essentially uncontroverted." *Cotton,* 122 S.Ct. at 1786 (internal quotation marks omitted). All of the evidence implicating Appellants in the drug conspiracy revealed that several pounds of methamphetamine were involved. The very nature of the conspiracy was to transport multiple pounds of the drug and then to break down and weigh the pieces. "Surely the [petit] jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least [ten] grams of [methamphetamine]." *Id. See also* 21 U.S.C. § 841(b)(1)(B)(viii). Under *Cotton,* because the government introduced overwhelming proof of the fact that supported the enhanced sentences, the *Apprendi* error here does not require reversal. *Id.*

12. Calculation of Drug Weights to be Attributed to Appellants Springfield, James, and Printz

Appellants Springfield, James, and Printz also argue that the district court erred in calculating the drug weights attributable to them for purposes of sentencing. We review a district court's factual determination as to the drug quantity attributable to a defendant for clear error. *See United States v. Palafox-Mazon,* 198 F.3d 1182 (9th Cir.2000).

Appellants may properly be held accountable for all quantities of drugs with which they were directly involved, and all reasonably foreseeable quantities that were within the scope of the criminal conspiracy. *See* U.S.S.G. § 1B1.3 (relevant conduct). Moreover, "a jury's verdict of acquittal

does not prevent the sentencing court from considering conduct underlying the acquitted charge." *See United States v. Watts,* 519 U.S. 148, 157, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997). Generally, the court must only find that the defendant engaged in the criminal conduct by a preponderance of the evidence; where, however, "a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction," a clear and convincing standard may be required. *See United States v. Valensia,* 222 F.3d 1173, 1178-79 (9th Cir.2000).

The district court found, by clear and convincing evidence, that Springfield and James were accountable for nine pounds of methamphetamine, and that Printz was accountable for ten pounds of methamphetamine. The district court's findings are not clearly erroneous.

The evidence showed that the Appellants were directly involved with the March 1997 shipment of methamphetamine. Bishop testified that Printz knowingly assisted in the transportation of the March shipment, and that Springfield and James thereafter assisted in breaking the drugs down for distribution. The DEA forensic chemist testified that any evaporation would have occurred *after* the drugs were exposed to air during breakdown. Because each of the three Appellants dealt with the drugs before or at the time they were broken down, each was properly held accountable for the full, pre-evaporation, quantity.

Bishop's testimony also reveals that Printz, Springfield, and James remained involved in the drug conspiracy during April 1997, and that – given their knowledge of the large quantity of drugs at play in the conspiracy – they could have reasonably foreseen the methamphetamine referenced in Counts IV and V. We reject the Appellants'

invitation to second guess the district court's determination of Bishop's credibility.

AFFIRMED in part, REVERSED and REMANDED in part.

UNITED STATES DISTRICT COURT

_____ District of Montana, Billings Division

UNITED STATES OF AMERICA

V.

VINCENT MARTINEZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 20, 1999)

CASE NUMBER:
CR 97-37-BLG-JDS-10

Brian Gallik
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[x] was found guilty on count(s) 1, 2, 6 of 3rd SI after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1); 846	Conspiracy to possess methamphetamine with intent to distribute	4-17-97	1
18:924(c)	Use of a firearm during a drug trafficking crime	7-20-96	2
18:924(c)	" "	4-17-97	6

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on count(s) 3, 4, 5, and 7 of 3rd SI

[x] Count(s) of underlying indictments (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
535-72-0361

Defendant's Date of Birth:
3-27-61

Defendant's USM No.:
05981-046

Defendant's Residence Address:

3455 Old Hardin Road
No. 33
Billings, MT 59101

Defendant's Mailing Address:

10-13-99
Date of Imposition of Judgment

/s/ Jack D. Shanstrom
Signature of Judicial Officer

Jack D. Shanstrom
Chief Judge
Name and Title of Judicial Officer

10-20-99
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 593 months .

293 months on Count 1, 60 months on Count 2, and 240 months on Count 6, all to run consecutive to one another.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m./p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

5 years on Count 1, 3 years on each of Counts 2 and 6, to run concurrent with one another.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditional on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

Defendant shall participate in a program of substance abuse treatment, as approved by the U.S. Probation Officer, until such time as defendant is released from the program by the probation officer. This program shall include urinalysis monitoring and breathalyser testing to determine if defendant has reverted to the use of drugs or alcohol.

Defendant shall abstain from the consumption of alcohol and shall not frequent establishments where alcohol is the primary item of sale.

Defendant shall submit his person, residence, office, or vehicle to a search, conducted by a U.S. Probation Officer, at a reaonable time and in a reasonable manner, based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to a search may be grounds for revocation. Defendant shall warn any other resident that the premises may be subject to searches pursuant to this condition.

Defendant shall notify the U.S. Probation Office at least ten (10) days prior to any change of address.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 300.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____ .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____ . An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. If the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

If necessary to ensure payment of the special assessment imposed, defendant all participate in the Bureau of Prisons Inmate Financial Responsibility Program.

[ ] Joint and Several.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary): The Court attributes 1,927.8 kg to the defendant, which reduces his base offense level by 4 levels under 2D1.1(c)(4). Defendant's criminal history is reduced 3 points resulting in a criminal history category of V.

Guideline Range Determined by the Court:

Total Offense Level: 35

Criminal History Category: V

Imprisonment Range: 235-293 months

Supervised Release Range: 3-5 years

Fine Range: $25,000 to $ $4,000,000

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic

circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): The sentence imposed is substantial and, in light of the defendant's background and the facts of this case, meets the statutory purposes of sentencing, namely punishment, deterrence, community protection, and rehabilitation.

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

Rules of Criminal Procedure

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) **Statement of Defendant**. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing; any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able

legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) **Defendant's Prior Record**. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) **Documents and Tangible Objects**. Upon request, of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Brian K. Gallik
GOETZ, GALLIK, BALDWIN & DOLAN, P.C.
35 North Grand
P.O. Box 428
Bozeman, Montana 59771-0428
(406) 587-0618

ATTORNEYS FOR DEFENDANT,
Vincent Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 3 – CARLOS SALAZAR-LOPEZ 4 – MARIANO PIMENTEL-TAFOLLA 6 – DONALD FRANK "GRIZ" PRINTZ 7 – RANDY JAMES 8 – JOSHUA SPRINGFIELD 9 – WILLIAM LANTER aka "WILD BILL" 10 – VINCENT MARTINEZ, Defendants.	Cause No. CR-97-37-BLG-JDS-10 AFFIDAVIT OF VINCENT MARTINEZ

STATE OF MONTANA)
: ss
County of Cascade)

Vincent Martinez, being sworn upon his oath, deposes and states as follows:

1. I am a defendant in the above-captioned matter. I am submitting this affidavit in support of my motion to dismiss the indictment against me because I believe that information I provided to the Untied States Government, with the understanding that such information would not be used against me, was in fact used by the government and led to my indictment.

2. By way of background, I was arrested on state felony charges in late December, 1995. While I was in jail, awaiting my initial trial date, I contacted the Narcotics Bureau of the State of Montana and advised them that I had information concerning drugs and drug trafficking in the Billings, Montana area, that would be of assistance to them. The reason I contacted them is because I wanted help, if possible, with my state court case.

3. A short time after I contacted the Narcotics Division, agents arrived at the Yellowstone County Detention Center and met with me. It is my understanding, through prior conversations or correspondence with my attorney at the time, Sandy Selvy, that Mr. Selvy arranged for the agents to meet with me. I was instructed by my attorney not to discuss the state court case in any way. It was also my understanding that the agents were not to discuss, in any way, my state court case.

4. Two agents arrived at the detention center and we were in a room together. I was not advised of my *Miranda* rights. I told them that I wanted help with my state court case and they indicated that they would see what they could do with respect to the information I provided to them. In exchange for the information I provided to them, the agents told me that they would try to help me out by advising the prosecuting attorney of the fact of my

assistance. I was told, and it was also my understanding, that the information I provided to the agents would not be used against me, or lead to my prosecution.

5. In reliance upon these representations, I gave the agents a statement with respect to narcotics and narcotics dealers in Billings, Montana. I identified a number of individuals, including Sherry Bishop, as individuals, involved in the sale of drugs in Billings. In addition, I answered questions about various individuals named by the agents.

6. The meeting with the agents lasted approximately 45 minutes. During that time, both agents took notes. At the end, the agents advised me that they would be back in a couple of days with paperwork for me to sign. I understood this to mean that the paperwork would consist of a formalization of the agreement that we reached in the jail, including the representation that the information I provided to them would not be used against me. The agents also advised me that they were going to talk to the prosecuting attorney and then return with the paperwork. The agents did not come back. At the end of the meeting we shook hands and they left.

7. On another occasion, following my conviction and sentencing on the state court charge, I was again sitting in the Yellowstone County Detention Center. At this time, I was waiting to be transported to Deer Lodge. Two agents came into the jail, unannounced, and took me to the small courtroom in the detention center and introduced themselves as federal agents. One of the agents starting [sic] talking to me about a case involving me and the State of Washington. Again, I was not read my rights. I asked to have my lawyers present and they said it was not

necessary. I then advised the agents that the case in Washington had been dismissed against me. One of the agents indicated to me that they had information about me and that if I provided them with information that they might be able to help me out with my state court case. It was also our understanding that any information I provided to them would not be used against me with respect to future charges.

8. I advised the officers that I had already provided statements to agents regarding narcotics. The agents then started asking me questions about Carlos Salazar and how much drugs and money he was involved with and I advised the agents that I knew Mr. Salazar, that I was driving in a vehicle with him when I was arrested in Washington state, but that I did not know about quantities. They also asked questions about Sherry Bishop, guns, drugs, Bill Lanter, Mr. Lanter's daughters and Moses Lake. The officers were present for about 30 minutes and said they would come back in a couple days after talking to the prosecuting attorney. The agents advised me that they would talk to the prosecuting attorney to help me out. I remember thinking to myself "sure" because I had heard that from the government agents in the past and the agents did not return. One of the agents, as I recall, questioned my truthfulness because, I believe, I could not give him information about quantities.

9. Following the meeting with these agents in the small courtroom of the detention center, I advised my attorney, Bill D'Alton, I believe by phone, of the offer of assistance with my state court case made by the federal agents. Mr. D'Alton advised me to be very careful and I advised him that I had not provided the agents with any information that I had not previously provided to them.

10. There was another time, prior to the incident I just described, when a heavy-set male and woman, whom I also understood to be government agents, interviewed me. Again, I provided them with information with the understanding that the information would not be used against me in the future. I also thought that the information would be used to help me with my state court case. As in the other occasions described in this affidavit, the agents did not come back.

11. I also gave a statement to, I believe, ATF agents concerning Jon Hardesty, whom I believe is also a witness against me. That statement has not been produced by the United States.

FURTHER AFFIANT SAYETH NOT.

DATED this 25 day of March, 1999.

/s/ Vincent Martinez
VINCENT MARTINEZ

SUBSCRIBED AND SWORN to before me this 25th day of March, 1999, by VINCENT MARTINEZ.

[Illegible]
Notary Public for the State of
Montana Residing at Great Falls, MT
My Commission expires:
11-18-2000

(SEAL)

REPORT OF INVESTIGATION

1. Program Code

2. Cross File Related Files
[X] RM-96-0002
[ ]
[ ]
[ ]
[ ]

3. File No. RM-~~94-0004~~ 96-0003

4. G-DEP Identifier WCA2B

5. TFO RICK LUECK

AT: BILLINGS, MONTANA P.O.

6. File Title LANTER, WILLIAM

7. [ ] Closed [ ] Requested Action Completed

[ ] Action Requested By:

8. Date Prepared 08-14-96

9. Other Officers:

10. Report RE: INTERVIEW OF VINCENT PEREZ MARTINEZ

SYNOPSIS

On 4-29-96, TFO WILLIAM CUMMINS and TFO RICK LUECK, Billings DER RO, met with VINCENT MARTINEZ, and completed a debriefing with the permission OF MARTINEZ'S attorney, SANDY SELVEY. The debriefing was initiated by VINCENT MARTINEZ.

DETAILS:

1. MARTINEZ advised that he had traveled to Billings, Montana from Modesto, California, with a CARLOS RAYES (RM-54-0003).

2. MARTINEZ indicated that CARLOS RAYES is an associate of a WILLIAM LANTER, (SEE RM-94-0003).

3. MARTINEZ advised that a WILLIAM LANTER is involved in drug trafficking and is involved in explosives, such as hand grenades, explosive devices, and dynamite, and does have a large cache of explosives in Lewiston, Montana.

4. MARTINEZ advised that ALBERTO COMMACHO and EMILLANO SERRANO still has two pounds of black tar heroin stashed, along with a large amounts of cash, somewhere in Billings, Mt.

5. MARTINEZ indicated that the organizer of the COMICKO/SERRINO Group, was an older Mexican male subject, who was now in Billings, Mt. This subject was apparently still trafficking in Drugs. MARTINEZ indicated that this older Mexican male was armed and extremely dangerous.

6. MARTINEZ gave other names of subjects in the Billings, Montana area that are trafficking in methamphetamine.

DONNES, EDDIE
BRYON, DEBBIE, AKA "FEATHER"
NAVA, VICTOR
NAVA, SAMMY
"TALL TIM"
BISHOP, SHERRY
SCHUMAKER, DANA
BRANDON, DOUGLAS

11. Distribution:
    Division SARI
    District SFD
    Other

12. Signature (Agent)
    TFO RICK LUECK

13. Date [Illegible]

14. Approved (Name and Title)
    /s/ [Illegible]
    RAC ANGELO SALADINO

15. Date [Illegible]

MOLIEDAY, MICHAEL
JOHNSON, PAMELA
"JUAN", Travels from Mexico

7. MARTINEZ advised that he had been staying at the address of 3455 Old Hardin Road, trailer #33, Billings, Mt, having the phone #606-259-0462.

8. MARTINEZ advised that he was now in the Yellowstone County Detention Facility, Billings, Mt. waiting for a sentence on a kidnapping charge and other related offenses.

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA IN AND
FOR THE COUNTY OF YELLOWSTONE

THE STATE OF MONTANA, Plaintiff, vs SHERRY BISHOP Defendant(s)	)	NO ___ APPLICATION FOR SEARCH WARRANT

* * * * * * * * * * * * * * * *

STEVE CWALINSKI, a duly appointed and Acting Agent for the Montana Department of Justice, Narcotics Investigation Bureau, being first duly sworn upon his oath, deposes and says:

That he has probable cause to believe that the offenses of CRIMINAL POSSESSION OF DANGEROUS DRUGS WITH THE INTENT TO SELL, FELONY, in violation of Section 45-9-103, Montana Code Annotated. Has been committed:

That he has probable cause reason to believe and does believe that in and upon the premises, curtilage, outbuildings and vehicles located at:

3412 FIFTH AVENUE SOUTH BILLINGS, YELLOWSTONE COUNTY MONTANA, FURTHER DESCRIBED AS A TWO STORY WITH BASEMENT, WOOD FRAMED, STUCCO SIDED, SINGLE FAMILY DWELLING. 3412 FIFTH AVENUE SOUTH IS LIGHT BROWN IN COLOR

WITH A SHINGLED ROOF. THIS ADDRESS HAS THE NUMBERS "3412" WHICH ARE CLEARLY VISIBLE ON THE FRONT, NORTH SIDE OF THE RESIDENCE NEXT TO THE FRONT DOOR. THIS RESIDENCE IS DEPICTED IN THE PHOTOGRAPHS ATTACHED TO EXHIBIT B.

* * *

wall as well as a .25 caliber semi automatic handgun on a foot rest. During this incident the informant again observed the previously described cash in the safe. The informant stated, while observing Bishop's activities over the past week, that bishop maintained a log where bishop tracked the amount of methamphetamine that was being given/sold to various people. The informant stated that Bishop was very methodical about documenting all transactions.

The informant had noted other items of interest to law enforcement, namely, the presence of a Tech 9 9mm handgun in the living room, syringes concealed beneath the carpet in the distribution room, and night vision equipment used to look for people sneaking up on the residents.

On April 29, 1998 Billings Police Department Detective Rick Lueck, who is assigned to the City/County Special Investigations Unit, interviewed Vincent Martinez. Martinez provided the names of several subjects in Billings, MT that were involved in methamphetamine sales and distribution. Sherry Bishop was a person identified by Martinez who sells methamphetamine.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CARLOS SALAZAR-LOPEZ, et al., Defendants.	)	CR No. 97-37-BLG-JDS Volume I

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing/trial before the HONORABLE JACK D. SHANSTROM, Chief United States District Judge, and a jury on June 2, 1999.

* * *

[4] P-R-O-C-E-E-D-I-N-G-S

(Open court.)

(Defendants not present.)

(Prospective jury not present.)

THE COURT: Good morning. You may be seated.

Ed, I think I'll have you read the indictment, at least the pertinent part of the indictment to the jury, so we can advise the jury of what the case is about prior to voir dire.

Also, I think it's important that we have a list of the witnesses that you intend to call so we can see if any of the jurors are familiar with any of the witnesses.

MR. LAWS: That's quite a long list, but I will.

THE COURT: Now, the matter that has been brought to my attention is a potential Bruton issue by Brian Gallik for Vincent Martinez.

MR. GALLIK: Yes, Your Honor. Would you like to hear that right now, Your Honor?

THE COURT: Yes.

MR. GALLIK: May it please the court, for the record my name is Brian Gallik. I represent Vincent Martinez. Over the weekend while preparing for this trial, Your Honor, I discovered that we have a Bruton problem, and I alerted the United States as well as counsel for Mr. Lanter and counsel for Mr. Salazar. Specifically, as my brief makes clear, and [5] as the court knows, having sat through a couple of hearings on the matter. Mr. Martinez provided law enforcement with a statement in April of 1996, and in that statement, which was taken by Agent Lucek and Cummins, he identifies the defendants Mr. Lanter, Mr. Salazar, Mr. Lanter as a drug dealer, dangerous persons involved with weapons. Mr. Salazar is associated with Mr. Latner. On the basis of that statement, I, of course, moved for dismissal as well as a dismissal of various counts on the basis of withdrawal.

And the problem emerges, Your Honor, under Bruton, as the court is aware, because Mr. Martinez will not be taking the stand in this case, the co-defendants have not had an opportunity to cross-examine Mr. Martinez regarding that particular statement.

Now, if that statement doesn't come in, then I am denied the opportunity to fully get into to [sic] my defense, which is if the government proves a conspiracy and if Mr. Martinez was part of that, that Mr. Martinez withdrew from that conspiracy on the basis of incarceration and advising law enforcement of that particular problem.

And I have submitted to the court a brief on that particular issue, and I don't intend to go over it unless the court would like further argument. But for that reason I have moved for Mr. Martinez to sever his particular case from this because of that problem. And as I said, there's a couple [6] recent Supreme Court decisions, Zafiro, makes clear that there is – if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, then the court must grant a severance in that particular case.

And in this case Mr. Martinez's statement inculpates the co-defendants and leads to exonerate him. So we've got a classic conflict here, one of two situations that the U.S. Supreme Court indicated would be grounds for severance.

THE COURT: And you claim that redaction would not solve the problem?

MR. GALLIK: No, Your Honor, because I think that the strength of the withdrawal in part is dependent on what it is that he tells law enforcement, and if he identifies people that the United States have alleged are co-conspirators, that goes to the very heart of the withdrawal defense.

THE COURT: I will hear from the government.

MR. LAWS: Your Honor, I just got, although Brian told me about this yesterday, I just got the brief and

haven't had an opportunity to read it yet, but I can inform the court that particular statement that we are talking about is the one that came up during the hearings from Agent Lucek. It was an oral statement that was made to Agent Lucek, and he wrote a report on it.

He would be the person who would testify about [7] that. We do not intend to ask him to testify about that. So the government will not bring that statement in in its case in chief.

The statement can't be brought in through Agent Lucek any other way that I'm aware of, and it looks to me like the solution for the defendant is to take the stand himself and tell what he told about the other defendants in the case while he's on the stand, if that's the way he wants to raise his claim.

But otherwise, the government's aware this is a Bruton problem, and has just decided not to present the evidence at all in the case.

So it's up to the defendant how he wants to proceed to prove his withdrawal from the conspiracy, and the best way for him to do that may be to call his own client to the stand.

MR. GALLIK: Your Honor, first of all, I don't think Mr. Laws disputes this, the existence of [sic] Bruton problem is not dependent on the government raising this issue with respect to Agent Lucek. And it's not necessary for Mr. Martinez to take the witness stand with respect to his withdrawal defense in this particular statement. It's a statement where several exceptions to the hearsay rule apply; 801, it's a statement against interest; it is 803; and

also under 804 are multiple bases or exception to the hearsay rule [8] for that statement to come into evidence.

And so Mr. Martinez does not need to waive his right of self-incrimination in order to withdraw or present a defense on withdrawal from this particular alleged conspiracy. He couldn't be forced, in any event, to make that waiver. It's a statement that is admissible under a number of exceptions to the hearsay rule, and we've got a classic Bruton problem here.

THE COURT: I am going to order the PSI, who have gone through, and I think there is some information that should be turned over to the various defendants, and we will order the PSIs to be turned over.

Sentencing recommendations will not be turned over.

MR. HOOVESTAL: Your Honor, that's on the Stifler issue, and the court will order that the sentencing recommendations –

THE COURT: No, not the sentencing recommendations. That's from the probation officer is all.

MR. HOOVESTAL: What is it exactly. I didn't understand?

THE COURT: Have you received the entire PSI so far?

MR. HOOVESTAL: No, I have not. I have not received anything under my Stifler request.

[9] THE COURT: You'll receive the PSIs.

MR. HOOVESTAL: Thank you.

THE COURT: There is the continuing motion that has been made here that all statements by co-conspirators are hearsay until the U.S. shows the conspiracy exists, and Mr. Laws, what is your prima facie proof of your conspiracy?

MR. LAWS: Your Honor, there will be a number of witnesses who will testify, and those witnesses, their testimony, can be used to lay the foundation as well, and basically the witnesses will testify as to dealings with and among the various defendants here starting back as far as 1994 and coming up to 1997.

The proof of the conspiracy involving various of the defendants comes in at various stages, since they didn't all walk into the conspiracy at the same time, but came in over a period of time. And as they come in, a foundation will be laid ahead of time showing how they came into the conspiracy through those witnesses. Of course, the government will sum up with proof involving records that basically back up the testimony of the several witnesses who were co-conspirators in the case, many of them.

THE COURT: How about an alleged prior bad act on kidnapping Jason Gillespie, are you going to go into that?

MR. LAWS: The kidnapping of Jason Gillespie takes place in the middle of this dealing, and is the reason

* * *

[170] MR. GALLIK: May it please the court, as the court knows, we are at the stage where the United States has given its opening statement, and I'm at the point now where I have the opportunity to provide an opening statement on behalf of Mr. Martinez.

I would respectfully renew my motion to sever Mr. Martinez's case from this case, Your Honor, for the reasons I have previously set forth.

And I advise the court that I would alert the court to situations where I'm going to, or I would like to get into the issue of Mr. Martinez's statement to law enforcement. And Mr. Martinez's statement to law enforcement, is a critical part of my theory in this case, and if I am not allowed to get into that, we've got some real problems. And we are at that stage in opening argument where I'm there, and I wanted to alert the court to it, and, again, I would renew my motion to sever.

THE COURT: The motion to sever is denied. You can go into your opening statement.

MR. GALLIK: I can go into the statement? My concern is, Your Honor, I don't want to cause a mistrial here, because Mr. Martinez is not going to take the witness stand in this case, and Mr. Errebo, who represents Mr. Lanter, and Mr. Hoovestal, who represents Mr. Salazar, will not be able to cross-examine my client, and that's why I alerted the court to [171] this. I think that's the Bruton problem, Your Honor.

THE COURT: Mr. Laws. I will allow you to respond to that.

MR. LAWS: Your Honor, I frankly don't – have never had this kind of a thing come up, and I don't know the answer of whether Bruton is simply a restriction on the government or whether it would apply to a co-defendant in a case.

As I have informed the court, the government has no intention of bringing out this statement in any way, shape, or form.

This would be, I would assume, Your Honor, something that would come out as a part of the defense case, and it would appear to me that maybe one solution [sic] might be thought about would be that the agent be put on and the statement extracted from him after all the other defendants have closed in this case, and Martinez be the last one left.

But, frankly, Judge, I have never researched this area, and I don't know exactly what the answer is. But the government is not going – the government is not going to raise this, and if Bruton is only the government's problem, then it's not going to be a problem.

MR. GALLAGHER: May I respond, Your Honor?

THE COURT: Yes.

MR. GALLIK: Your Honor, I did look at this over [172] the weekend, and I did submit a brief, and my understanding of the Bruton problem is this: I don't think it matters, I think it is irrelevant if the government attempts to bring it into evidence or if a co-defendant attempts to raise it. What Bruton protects are those individuals' clients right to confront witnesses. Whether that takes the form of the United States putting on the evidence, or whether it takes the form of a co-defendant putting on the witness, if that co-defendant has a Fifth Amendment privilege, as Mr. Martinez does, not to testify, he is not available for cross-examination, and these people have been denied their right of confrontation.

Now, with respect to whether or not this is going to come up in the case in chief of the United States, the answer to that – well, first of all, I would like to raise it in my opening statement.

Second of all, Sherry Bishop is a witness that the United States intends to call, and some of these other agents, I think Agent Cwalloski will also be on the witness stand talking about the search that they did, the basis for the search. As the court knows, having sat through two hearings, Mr. Martinez's statement formed the basis of the government's application for a search warrant, which is what got this whole thing started.

So it's – I think it's relevant when Ms. Bishop hits the stand and also when some of these agents hit the [173] stand.

MR. LAWS: If I may, Your Honor, let me make one more suggestion. If this – two suggestions.

I don't believe that the defendant can hide behind his right not to take the stand and pose a defense that puts him diacritically opposed to that. There are other areas of the law, and I have run into this problem, Your Honor, and basically the courts have said you make your choice about what your defense is, and if it means that you have to take the stand, then you're going to have to take the stand.

And I believe that was in the situation, Your Honor, where if a defendant took the stand he was going to be impeached with prior offenses, and he was trying to suppress impeachment by the prior offense if he had to take the stand, and the court said, you know, that's fair

impeachment, and you have to make that decision if you're going to do it or not.

So maybe that's one way to look at this.

The other thing is, as I understand what the defense is here, is that when this man came forward and talked to law enforcement in, I believe, April of '96, what he will claim is that at that point in time he withdrew from the conspiracy.

Now, he names people other than Lanter and Salazar, who are in the conspiracy. I see that it would be possible for him to take the stand and say that he named – or [174] that the agent would say that he mentioned people who were involved in the conspiracy other than the named defendants, Sherry Bishop being one of them.

THE COURT: And selecting the names of the –

MR. LAW: And selecting the names of those people who are on trial here. It seems to me that the defense could make the same claimed withdrawal of the conspiracy that way, too, which I don't think he did, but in any event, they can make a claim.

MR. GALLIK: May I be heard on the new issue, Your Honor?

THE COURT: Yes.

MR. GALLIK: First, with respect to Mr. Laws' argument that Mr. Martinez has to choose between constitutional rights, I just think that's not true. He has a Fifth Amendment right against self-incrimination, he can exercise that right. The statement that he gave to law enforcement that was used by the government to get this

ball rolling is admissible under 804. Under 804 it talks about grounds of unavailability. There are five separate grounds. One is a claim of privilege. That's what we have here.

And the claim of privilege, it says where the claim – I'm citing – I'm reading out of Goode, G-o-o-d-e, and Wellborne, Federal Evidence, Courtroom Handbook on Federal evidence. It says, where the privilege that would be invoked [175] is self-incrimination and the circumstances clearly indicate that such a claim would [sic] exercised, an actual invocation is not often – is often not required. So they recognize that case, and that's the United States versus Williams, 927 F.2d, 95.

That claim – that case, I haven't read it, I'm reading out of this handbook, recognizes that the claim against self-incrimination exists, it applies under 804, and Mr. Martinez doesn't have to get on the stand to invoke that.

I have advised the court of that, and that is sufficient. Now, with respect to Mr. Laws' suggestion that we can put the agent on the stand and elicit the names of these various people that Mr. Martinez talked about, that certainly can be done. I point out to the court, however, you heard Mr. Laws say, I don't think that's withdrawal. This goes not only to the issue of withdrawal, but also to Mr. Martinez's participation, knowing and willing participation, in the conspiracy in the first place. It also goes to the issue of withdrawal.

If this matter goes to the jury on the counts after April 26, or even on the other two counts, the trier of fact, the jury here, is going to have to make a determination of the facts. We've already heard Mr. Laws indicate I don't think that was withdrawal. He named names. Well, a lot of

those people, yes, are in this courtroom and will be in this [176] courtroom.

But if the jury is going to be deprived of two other names, critical names, then that goes to the very heart of this defense. That's what Bruton says, you can redact those names and the statement can go in.

MR. GALLIK: Well, I don't know if that's the precise ruling. Redaction is a remedy that is available in certain circumstances, and I respectfully submit, Your Honor, in this case redaction is not an appropriate remedy because of the very problem that I talked about. I am deprived of putting on evidence for the jury's consideration on, one, the existence of Mr. Martinez's knowing participation in a criminal conspiracy. And even if they were to find, yes, he was part of that for a period of time, on April 26, when he was incarcerated, when he gave a statement to law enforcement identifying these various people, who it is he identified is critical. And if the government is going to say, well, we don't think that's withdrawal, but on the other hand I can't argue, well, there's two other people out here whose names I can't talk to you about but they are in the courtroom today, then we've got, again, a very serious problem for Mr. Martinez.

THE COURT: The counts that you were asking to be dismissed are what?

MR. GALLIK: Initially, Your Honor, counts – [177] well, the three substantive possession counts, Mr. Martinez, as I recall, there would have been in 1997, when he was incarcerated for the most part I believe at the Yellowstone County Detention Center.

Since that time I also at the same time filed a motion for a bill of particulars. Now, I believe there are two gun counts that also may fall within the motion to dismiss because they involved activity that occurred after that particular statement, and I'm aware of one count, the government may enlighten me on the other counts, but I'm positive there are two counts conspiracy and the first gun count that involve matters that occurred before April 26th. The other five, I know four of those counts, I believe, occurred after April 26. I believe the events will show that, and there's one that I'm not quite sure on, and I'm not sure what the evidence will show there.

THE COURT: What, I severed counts 3, 4, 5, 6, and 7, but left Count 17.

MR. GALLIK: Again, maybe I didn't make it clear, Part of my argument, Mr. Laws referred to the jury as this conspiracy as being a society of secrecy or society of secrecy. Some of the over acts, or one of the purposes of the conspiracy as alleged by the government in the indictment is to hide the details of the conspiracy from law enforcement. My argument will be that if Mr. Martinez is a knowing [178] participant in this criminal conspiracy, one of the objects of which was to hide the objects of that conspiracy, why is he then turning in Sherry Bishop, Bill Lanter, Carlos Salazar, if he was a knowing and willing participant in this conspiracy as alleged by the government?

So that's where the problem comes in, too. There is some spillage there. That's my – that's why the issue with respect to his statements is still relevant with respect to the other counts.

MR. LAWS: Your Honor, I certainly am reluctant to agree to severance. I would ask if the court, although I realize it would burn up [sic] half hour of jury time here, I wonder if the court would grant us overnight to take a look at this and see if the issue has been well framed at this point, see if there is an answer short of throwing out three-quarters of the government's case against this man.

THE COURT: Is there anybody else going to make an opening statement at this time?

MR. GALLIK: No, Your Honor, I was the last one, Your Honor.

THE COURT: I think what we will do is I will adjourn for the evening then and you can get your brief to me, Ed, or anything that you have at 8 and we will have a hearing at 8:30.

If you have any supplement, can you make it then.

[179] MR. GALLIK: Thank you, Your Honor.

THE COURT: Bring the jury back in.

MR. JENT: Your Honor, all counsel to appear then?

THE COURT: Yes, I think I will have you all here.

(Defendants present.)

(Jury present.)

THE COURT: Ladies and gentlemen of the jury, a legal issue has come up that the court must determine

before we can proceed in this matter. We are going to need some time to brief it and research it. So what I'm going to do is adjourn for the evening with the jury. I will dismiss the jury at this time, and we will reconvene at 9 a.m.

I do want to admonish the jury, again, not to discuss this case with anyone until you've heard all of the testimony and evidence. As of this time, the only thing you've heard is opening statements. You've not heard any evidence.

But, again, if anyone should attempt to discuss this case with you, inform them that you're a juror and not at liberty to discuss it. And report back directly to the jury room at 9 a.m. and we will get started with the case promptly at that time.

(4:25 p.m. court adjourned.)

* * *

[185] PROCEEDINGS

(Open court.)

(Jury not present.)

(Defendants not present)

THE COURT: We were going to hear arguments on the Bruton issue as it pertains to Martinez and the statement that he gave. You may proceed.

MR. TOSCAS: Good morning, Your Honor, George Toscas on behalf of the United States.

I initially wanted to apologize. We had prepared a document last night to file this morning, and after coming

in a little bit early this morning and looking it over, I don't feel comfortable filing it, and I have advised your clerk of that, and requested to just proceed orally. And I hope that's sufficient.

Initially, Your Honor, we were prepared to come in and argue that this statement could be admitted not for the truth of the matter asserted, and, therefore, not be in violation of Bruton. We have since reconsidered that, and initially I would like to say that the statement that was given by defendant Martinez to Officer Lucek, we agree is not hearsay.

That it would not be offered for the truth of the matter asserted. That it in fact would be *res gestae*, and there's a case, U.S. Karr, K-a-r-r, 742 Fed.2d 493, Ninth [186] Circuit case, 1984, that is pretty much similar to this in saying that such statement would not be considered to be hearsay.

We would argue, Your Honor, that this court should exclude the statement and should not allow the defendant to elicit this information from Officer Lucek on the grounds that the statement is not relevant and that the statement is potentially confusing.

Initially, we would argue that the statement is not relevant to a defense of withdrawal because the defendant within the statement does not say that he was involved in drug trafficking. The statement does not say that the defendant was involved in a conspiracy. The statement does not say in fact that anybody was involved in a conspiracy to sell drugs. If anything, this statement was a misleading statement given to the police, possibly to deflect attention from the defendant onto others. As a

result, we believe because it does not implicate the defendant at all and does not speak of any conspiracy. Because of its misleading nature towards the police, it is both irrelevant and it would be confusing to this jury in the same way that it was confusing to the police. It was intended to confuse the police.

The standard for withdrawal as outlined in U.S. versus Lothian, Ninth Circuit case is 1992 976 Fed.2d 1257, to withdraw from a conspiracy a defendant must either disavow the [187] unlawful goal of the conspiracy, affirmatively act to defeat the purpose of the conspiracy, or take definite decisive and positive steps to show that his disassociation from the conspiracy is sufficient.

While not arguing that this statement is not a withdrawal, I would argue that looking at the standard for withdrawal as outlined in Lothian, that this statement does not support in any way a claim that the defendant withdrew. That is not relevant to support a claim that the defendant withdrew at that time, and we would ask initially that the court rule that it would be both irrelevant and confusing, and, therefore, excluded on those grounds.

As an alternative, we would offer that given the fact that this issue has been raised at this point at this late a date, and that it is, given the initial argument that I've made, potentially irrelevant and confusing, if the court is looking for a compromise, and if the court is unwilling to exclude it on relevance and confusion grounds, the best compromise may be to allow the defendant to elicit from Officer Lucek the fact that at the time he gave this statement he mentioned that Sherry Bishop, who was a

co-conspirator in this case, was involved in methamphetamine trafficking, and in fact we would concede that two other people on this list that the defendant gave, if I may, a list of 11 names were given, Your Honor, and three of those individuals we would concede [188] are co-conspirators in this case, unindicted co-conspirators, Eddie Donnes, Carlos Reyes, and Douglas Brandon. We believe that if the court is unwilling to exclude the statement of relevance grounds, that the court could sanitize the statement to exclude any exception of Mr. Lanter, and in this statement Carlos Reyes, who the defendant will claim is Carlos Salazar, and whatever benefit the defendant would gain from arguing this is a statement of withdrawal would be just the same if only the name Sherry Bishop, Eddie Donnes, and Douglas Brandon are used as the benefit he would receive if he mentioned Bill Lanter and Carlos Salazar. In that way I believe this is the best, if the court is unwilling to exclude it in its entirety, this would be the best compromise.

The defendant would get the benefit of arguing that he mentioned other co-conspirators at this time for whatever purpose he believes he can tie that up into a withdrawal defense, and the two other defendants are not prejudiced by bringing their names in and telling the jury that this defendant claimed that they were involved in drug trafficking.

I would go on to say, Your Honor, that Carlos Salazar, there is no mention in here that he was involved in drug trafficking. So we may be able to exclude him entirely on that ground, because all it says is Martinez indicated that Carlos Reyes is an associate of William Lanter. That's a far [189] cry from saying he is a drug dealer, a co-conspirator, a leader of a conspiracy.

We believe that if the court is unwilling to exclude the statement in its entirety, it's possible to sanitize it in the way that I have mentioned just using the three names of Bishop, Eddie Donnes, and Douglas Brandon, and we would also ask if that compromise is chosen, that the jury be told, or that we be limited to discussing the fact that these are three co-conspirators that he mentioned; that no mention be made of any defendants that are on trial here; and in addition, that a limiting instruction be given to the jury in addition to that stating that it's not offered for the truth of the matter but only in support of the defendant's claim that he makes a withdrawal and that the jury should not consider it as to any other defendant.

MR. GALLIK: Good morning, Your Honor. For the record, Brian Gallik, on behalf of Vince Martinez.

I will take the arguments of the United States in the order they were presented. The first is with respect to relevance, and quite frankly, Your Honor it's not a very convincing argument.

The statement is very relevant, and I think that's been demonstrated by the fact Agent Cwalinski found the statement to be of sufficient reliability that he included it in his application for a search warrant to the district court [190] judge to get an [sic] search warrant to search Ms. Bishop's home.

They thought it was relevant for purposes of getting a search warrant, for purposes of raiding Sherry Bishop's home, and in fact led to the discovery of drugs and here we are today. It is clearly a relevant statement. It is clearly relevant to the issue of withdrawal to indicate the step, assuming there is a conspiracy, of withdrawing from that conspiracy. The government has alleged these people are

co-conspirators. Mr. Bishop – I'm sorry, Ms. Bishop, Mr. Martinez, Mr. Lanter, these people are involved in methamphetamine dealing, and he identifies Sherry Bishop as a methamphetamine dealer. He identifies Mr. Lanter as a drug dealer. It's clearly relevant to the issue of withdrawal, clearly relevant.

The other problem with respect to Mr. Toscas' argument it doesn't implicate the defendant. Well, I think it does, Your Honor. First of all, part of the government's proof here is that they have to associate Mr. Martinez with these various individuals, and I think that statement does that. It's a statement that cuts both ways. I can use it for purposes of withdrawal. But, also, it cuts against Mr. Martinez from the standpoint, a, [sic] here's a statement that he gave indicating he came to California, or Montana, with Mr. Carlos Reyes; he knows these people, apparently associated with them; and so that argument doesn't hold water either.

[191] So it's clearly relevant, Your Honor, and I think it is highly relevant to Mr. Martinez' withdrawal defense. And in fact, the government. I moved some time ago to dismiss three counts on the basis of withdrawal citing this very statement, and I did not hear at that point in time the government arguing that it was not relevant. Instead, pointing out, well, this is closing argument information. So I think it's a little late in the day to be raising that issue.

With respect to the issue being raised at this late date, frankly, I take responsibility for that. It was an oversight on my part while preparing for trial. Frankly, I didn't think about it until we got lear [sic] and as soon as it became an issue I took steps to alert the court and counsel for the United States, and I wanted to do it before

trial to make sure we don't find ourselves in the middle of the trial with a mistrial, which would affect everybody.

With respect to the compromise, my review of the discovery in this case, Your Honor, the government is willing to stipulate that certain people are co-conspirators in this case. Well, the conspiracy here is the government's legal theory. They have the ability to determine who is in the conspiracy, who is not in the conspiracy. That's just a simple legal theory. My review of the discovery in this case indicates that Mr. Martinez's statement, that there are other [192] people that he identified that are mentioned all over in this discovery. Mike Holliday, for example. He's dealing methamphetamine. He's dealing with Sherry Bishop, Carlos Salazar, Bill Lanter, and that's just one example. I think there are one or two other people. One of the persons is named in Sherry Bishop's drug ledger.

So compromise, I'm not sure it is quite workable, and if we can't get into Mr. Lanter, again, where does that put us? That's relevant evidence, I think, with respect to the quality or the affirmative argument with respect to withdrawal.

The government has determined that these people are co-conspirators of Mr. Martinez. Mr. Martinez tells law enforcement, these guys are drug dealers. All right. We don't know for sure what happened in that interview room. Mr. Lucek was there, debriefed him. We don't have the notes. That's another problem. A report wasn't prepared for another four months after the debriefing. We don't know what Mr. Lucek asked. Did he ask Mr. Martinez, were you a part of this conspiracy? That's the problem with this conspiracy argument.

That's the government's theory. And I don't think Mr. Lucek was in there trying to make an argument about conspiracy. I don't think he was thinking that at all. And so I don't think that argument is particularly persuasive [193] either.

So with that, Your Honor, I have nothing further unless the court has any questions.

MR. TOSCAS: Initially, Your Honor, the statement can have varying degrees of relevance on a variety of different issues. As to a search warrant, a search of Sherry Bishop's house, this statement may have a certain level of relevance. That doesn't matter here. The relevance I'm talking about is the relevance of this statement to a defense of withdrawal, to a claim of withdrawal. So where Mr. Gallik says this statement was relevant enough to put in a search warrant application, that very well may be true, but that does not mean that the statement rises to the level of being relevant to a withdrawal claim.

And that is what I'm asking the court to look at the statement, and I know you've seen it many times, it has been the subject of many different hearings, but this statement simply does not implicate the defendant at all. He does not make mention of himself, his drug dealing. He does not make mention of the fact that these other people are acting in concert in their drug dealing activities.

The defendant merely gives a list of names, and I believe the court has already heard in a previous hearing Officer Lucek tell this court that the notes that he had, to the best of his recollection, were a list of names, and he [194] used those notes, which was simply a list of names, to reproduce that list on these DEA 6s.

There is no reason to believe that there is anything more than what's on this statement, and what's on this statement is simply irrelevant to a claim of withdrawal because it does not satisfy any of the elements of withdrawal as laid out by the Lothian case.

With regard to the compromise that I have offered, Your Honor, and I don't want to abandon my initial argument, or have the court believe that I believe that argument is a weak one. I believe this statement is absolutely irrelevant with regard to meeting or satisfying a claim of withdrawal. And I would ask the court to so rule.

But I offer this because I understand that at this late a date and on the morning that the defendant is going to give his opening statement, that we may have to reach a compromise here, and the court may be unwilling to exclude it in its entirety.

The discussion that Mr. Gallik has about the conspiracy and the way it's been charged and the problems with conspiracy, Your Honor, if he is going to claim withdrawal, it is implicit in that argument that he was a member of the conspiracy. You can't have it both ways. If you are going to say you withdraw at some point, if that's his defense, then implicit in that defense is that, yes, I was a member, and, [195] therefore, I withdrew.

So what I'm saying is that if the court is so inclined that there is a compromise here, that the defendant did mention other co-conspirators other than Carlos Salazar and William Lanter, and, again, the mention of Salazar is only tangential in relation to drug activity, there are, and in sitting down here, I noticed another name on here, defense counsel is right, Michael Holliday. We would be willing to stipulate, if the court so desires to go with this

compromise solution, that Eddie Donnes, Sherry Bishop, Douglas Brandon, and Michael Holliday are unindicted co-conspirators in this case, and for whatever purpose the defendant would like to make use of this statement to say that his mentioning of other people who were involved in this conspiracy, without talking about the conspiracy, is evidence of – or tends to show one of the elements of withdrawal, then I believe that that is just as good as making an argument that he also gave the name of Bill Lanter or also gave the name of Carlos Salazar.

Whatever benefit the defendant seeks to gain by mentioning those two names is also gained by mentioning other co-conspirators' names. And in that way that would be a compromise solution, because the defendant can go ahead and make his claim of withdrawal, that he mentioned co-conspirators' names to Officer Lucek, without mentioning the conspiracy, and at the same time not violate Mr. Lanter's [196] or Mr. Salazar's rights. That is the reason why – I'm do doing my best as well, Your Honor, to come up with an answer to a very hard question.

But I believe this court can exclude the statement in its entirety on the grounds that it is irrelevant to support a claim of withdrawal. If the court does not agree, I believe the compromise solution is the best we an do and still provides the defendant with all the benefits that he sought to gain by its introduction. Thank you.

THE COURT: Nobody has – and I'm taking this under advisement and I will get a ruling out in [sic] it before we start, but nobody has mentioned the other partial solution of dismissing three counts that he's talking about, and that would have happened after the

withdrawal, assuming there was a withdrawal. Then the statement wouldn't be relevant at all.

MR. TOSCAS: My argument would be the same, Your Honor, the court should not dismiss those counts because of the fact that this statement is not relevant to show that any of the elements of withdrawal were satisfied.

MR. GALLIK: With respect to the court's suggestion, I believe, Your Honor, there may be two gun counts that may also be subject to the same withdrawal motion. I know one of the gun counts clearly falls within the withdrawal argument because it occurred after Mr. Martinez gave his statement and was in fact incarcerated. So that's a potential [197] problem that I see with that, Your Honor.

THE COURT: I will take a ten-minute recess here and then we will come back.

(Recess.)

(Open court.)

(Jury not present.)

(Defendants not present.)

THE COURT: You may be seated. The court is prepared to rule on this motion at this time. This motion is kind of coming in through the back door. Actually, it shouldn't really be Martinez's motion to make, but I'm going to treat it now as a motion in limine, and I am going to rule that the statement is inadmissible. I'm going to exclude that statement on the grounds of irrelevance, confusing, and does not satisfy the elements of the claim of

withdrawal. So you're not going to be able to use the statement.

That is the motion really that should have been brought by Salazar and Lanter. But where it's brought to the court's attention, I'm going to exclude the statement in its entirety.

MR. GALLIK: Your Honor, may I make [sic] ask for a clarification on that, because there is one issue . . .

As you know, Your Honor, and I have argued this before, the statement also finds its way into the application for search warrant.

[198] THE COURT: I understand that, and I think the statements take on relevancy for different issues, just as in a preliminary hearing or revocation hearing statements are admissible that are not admissible at trial, and I think this is that situation.

MR. GALLIK: So as I understand the court's ruling, just so that I don't step into this, the statement that he made to the agent and subsequent use of that is deemed by the court to be irrelevant and –

THE COURT: Yes.

MR. GALLIK: – and not a basis for withdrawal; is that correct?

THE COURT: That is correct.

MR. GALLIK: I understand.

THE COURT: When we come, you can make your opening statement and then we will get started into the –

MR. GALLIK: I will be waiving my opening statement, Your Honor, in light of that.

THE COURT: He's waiving his opening statement.

MR. GALLIK: I'm sorry, reserving.

THE COURT: Reserving. So you can call your first witness when we get started.

(Recess.)

(Open court.)

(Defendants present.)

* * *